No. 96-1342

Supreme Court, U.S.
FILED
MAR 26 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

—v.—

LUNDELL MANUFACTURING COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

Of Counsel:

Dean Ringel
Barbara Swann
CAHILL GORDON & REINDEL
(a partnership including
a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

Alan N. Braverman
Senior Vice President
and General Counsel
John W. Zucker
Senior General Attorney
ABC, Inc.
77 West 66th Street
New York, New York 10023

FLOYD ABRAMS
Counsel of Record
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
American Broadcasting Companies, Inc.

15 pp

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioner American Broadcasting Companies, Inc. ("ABC") informs the Court of the following:

ABC is a wholly owned subsidiary of ABC Holding Company, Inc., which is itself a wholly owned subsidiary of ABC, Inc. ABC, Inc. is a wholly owned subsidiary of Disney Enterprises, Inc., which is itself a wholly owned subsidiary of The Walt Disney Company, a publicly held corporation. ABC has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

1. The Eighth Circuit's Analysis Of What Constitutes "Participation" In A Public Controversy Is Inconsistent With That Of Other Circuits In A Manner Which Requires Clarification And Resolution By This Court 2

2. There Is No Factual Dispute Concerning The Nature And Extent Of Lundell's Participation In The Public Controversy Identified By The Eighth Circuit Which Precludes This Court's Review ... 6

3. Review Of The Rules For Public Figure Determination Is An Appropriate Function For This Court Under The Constitution 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases PAGE

Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) 9

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) ....*passim*

Graddick v. *Newman*, 453 U.S. 928 (1981)..... 9n

Hutchinson v. *Proxmire*, 443 U.S. 111 (1979)..... 5

Marcone v. *Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) 4

McDowell v. *Paiewonsky*, 769 F.2d 942 (3d Cir. 1985) 2, 3

Rosenbloom v. *Metromedia, Inc.*, 403 U.S. 29 (1971).4, 5, 8

Trotter v. *Jack Anderson Enterprises, Inc.*, 818 F.2d 431 (5th Cir. 1987)..... 4

Wolston v. *Reader's Digest Association*, 443 U.S. 157 (1979) 5

Law Reviews

Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulation*, 16 N. Ill. U. L. Rev. 141 (1995) ... 5n

Harry W. Stonecipher & Don Sneed, *A Survey of the Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine*, 46 Ark. L. Rev. 303 (1993) 5n

PAGE

Treatises

Rodney A. Smolla, *Law of Defamation* (1996) 2n

13A Charles A. Wright *et al.*, Federal Practice & Procedure (West 1984 & 1996 Supp.)..... 9n

REPLY BRIEF OF PETITIONER

Respondent's Brief in Opposition attempts to deflect focus both from the cert-worthy issues presented for review by the Petition and from the undisputed facts which define those issues. But those efforts cannot obscure the fact that the Petition raises important and unresolved issues of public figure definition which are squarely presented by the facts that respondent accepts, however grudgingly.

Thus, Lundell acknowledges that:

(1) "the garbage disposal problem in Berrien County" was "a public controversy" within the meaning of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and its progeny—as the Eighth Circuit held (App. 20a, 98 F.3d at 363; *see* Brief in Opposition ("Br. Opp.") at 2);

(2) Lundell did, in fact, market and sell to Berrien County a machine it described as the "solution" to such garbage problem (Br. Opp. at 8); and

(3) Lundell's voluntary participation in efforts to solve the "problem" constituting the controversy and the role of its machine in addressing that problem had been the subject of newspaper coverage prior to any reporting by ABC (Br. Opp. at 7; R. 700; and see *infra* Part 2).

Nevertheless, Lundell maintains (and the Eighth Circuit held) that Lundell was not a public figure because it declined to speak out in a political debate that followed the heated discussion of the efforts of the Berrien County government to find a solution to the garbage problem itself. Respondent's opposition confounds that subsequent political debate with the public controversy defined by the Eighth Circuit (see, for example, Br. Opp. at 2) and offers a series of cleverly worded, if ultimately empty, charges of "misstatements" of the record,

designed to trivialize its role and support the asserted inappropriateness of review by this Court. We deal in Part 2 of this Reply with a point-by-point refutation of those charges, a refutation which underscores the red-herring character of those charges and at the same time makes clear the scope of the factors pointing to Lundell's limited-purpose public figure status.

We turn first to the key element of the Petition: the existence of a plain and significant split in the circuits on how to define a public figure, a subject of recurring controversy in the lower courts requiring guidance from this Court.

1. The Eighth Circuit's Analysis Of What Constitutes "Participation" In A Public Controversy Is Inconsistent With That Of Other Circuits In A Manner Which Requires Clarification And Resolution By This Court

At the core of Lundell's legal position is the notion that no conflict actually exists between the Eighth Circuit's approach to defining a public figure and that of other circuits. But its very quotation of the standards applied by the Third Circuit illustrates both the differing standards and the differing results to which they necessarily lead.

Lundell acknowledges that the Third Circuit examines two factors in determining whether a plaintiff is a "limited purpose public figure":

> "The court must consider
>
> (1) whether the alleged defamation involves a public controversy, and (2) the nature and extent of plaintiff's involvement in that controversy."

(Br. Opp. at 13) (*quoting McDowell* v. *Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985))

Strikingly, there is no mention whatsoever of any requirement: (a) that plaintiff's participation in a controversy is to be

measured only by its *speech* (as opposed to a voluntary "course of conduct" that, in the language of the Third Circuit, "invites attention," *McDowell*, 769 F.2d at 949) or (b) that plaintiff's conduct which invites attention must be undertaken for purposes of injecting itself into a political debate to influence the issues involved.

Yet those are requirements that respondent's approach—echoing that of the Eighth Circuit—would graft onto the public figure rule. Neither *Gertz* nor any of this Court's later cases impose such requirements. Indeed, any such approach would undo the flexibility which most circuits have recognized in *Gertz*' broad focus on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation" (418 U.S. at 352).

Here, if one applies the Third Circuit test, it is plain that plaintiff would be a public figure. The Eighth Circuit itself recognized the existence of a public controversy—the "garbage disposal problem in Berrien County" (App. 20a; 98 F.3d 363), and it is evident that Lundell voluntarily embarked on a course of conduct that "invited attention" (McDowell, 769 F.2d at 950) to its role in proffering a solution to that controversy. In this regard, the government official responsible for selecting Lundell's machine, the Berrien County Chairman, testified that the County Commission "ended up selecting Lundell Manufacturing Company's garbage recycling machine as the solution to [the County's] garbage problem" (R. 406)—the "solution" promised by Lundell in its advertising brochure (R. 287-88). The "nature and extent" of Lundell's voluntary action in proffering its machine as a solution to the County's garbage problem would thus render Lundell a limited purpose public figure in the Third Circuit.

Lundell seeks to minimize the significance of its touting of its product as the "solution" to garbage disposal problems by characterizing its own advertising as mere "slogan[s]" which were not made "in the context of the public debate in Berrien County." (Br. Opp. at 8) The Eighth Circuit, as well, con-

cluded that Lundell's sale of its machine was insignificant because ABC's journalist "admitted that she 'did not uncover any evidence from any source that [Lundell] had attempted to inject [itself] into [the] *political debate* of Berrien County.' " (App. 22a; 98 F.3d at 364) (emphasis added) But the public controversy recognized by the Eighth Circuit was "the garbage disposal problem in Berrien County." (App. 20a; 98 F.3d at 363) This was the very problem Lundell offered a solution to, a controversy that was already a focus of intense public attention. (R. 1109-12, 114-23, 1132-35, 1137-46) The political debate referred to by the Eighth Circuit erupted only *after*, indeed as a result of, the sale of the Lundell garbage recycling machine to Berrien County in September 1988 and the opening three months later of the Berrien County garbage recycling plant. (R. 129, 495-97, 1082-83, 1088-93, 1197-99, 1102, 1108)

That Lundell chose to stand silent in the political debate that ensued after the Berrien County government used public funds without voter approval to adopt the Lundell "solution" to the garbage disposal problem, does not alter the centrality of Lundell's involvement in the pre-existing controversy identified by the Eighth Circuit. Unlike the Eighth Circuit, the Third and Fifth Circuits recognize that "the plaintiff's action may itself invite comment and attention and even though [it] does not directly try or even want to attract the public's attention, [it] is deemed to have assumed the risk of such attention." *Marcone* v. *Penthouse International Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *see also Trotter* v. *Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 435-36 & n. 16 (5th Cir. 1987).

This approach is not, as Lundell suggests, one which reflects a return to the "newsworthiness" standard of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), rejected by this Court in *Gertz*. Emphasis on the voluntariness of a plaintiff's conduct, its character in inviting attention, and the requirement of the existence of a specific public controversy,

all elements looked to by the Third and Fifth Circuits, among others, reflect the focus in *Gertz* on concepts of "assumption of risk," a focus wholly absent from *Rosenbloom*.

But *Gertz*, for all its seminal import, raised and left unresolved certain critical ambiguities.[1] The open question, simply stated, is: where there is a pre-existing controversy (as there was *not* in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979)), and where plaintiff's conduct in involving itself in the controversy was voluntary (as was *not* the case in *Wolston* v. *Reader's Digest Association*, 443 U.S. 157 (1979)), must a plaintiff set about to influence the outcome of the controversy through speech directed to that controversy? Or is it sufficient for public figure status that the plaintiff's conduct in involving itself in the public controversy is voluntary and is such as to "invite attention and comment?" *Gertz*, 418 U.S. at 345. That question remains unanswered; it is of enormous, continuing significance.

Respondent—and the Eighth Circuit—would add to the *Gertz* generalized focus on "the nature and extent of an individual's participation in the particular controversy" a gloss requiring a specific means of participation (speaking out to the press rather than through marketing literature or conduct, for example) and intent (to influence a political debate rather

---

[1] The shared sense among lower courts, legal scholars and commentators is that *Gertz* itself needs to be revisited to provide additional guidance to the lower courts in determining who is a limited purpose public figure. See Petition at 8-10; and see, for example: Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz* v. *Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*, 16 N. Ill. U. L. Rev. 141, 159, 172 (1995) ("The U.S. Supreme Court's failure to articulate a precise standard of determining a defamation plaintiff's status that can be applied to varying fact situations has led to inconsistent and conflicting lower court determinations with regard to [the public figure] issue"; "[T]he need for the Court to clear up the confusion surrounding these issues seems obvious . . ."); *see also* Harry W. Stonecipher & Don Sneed, *A Survey Of The Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine*, 46 Ark. L. Rev. 303, 331 (1993).

than taking action knowing it will invite attention). Such elements, although certainly referred to in this Court's decisions, have not been treated by this Court as dispositive litmus tests to be applied in lieu of case-by-case analysis of the true "nature and extent" of the individual's role in the controversy.[2]

The flexibility inherent in evaluation of the overall "participation" standard offers a sounder means of accommodating the variety of factual circumstances that may arise in public figure analysis. The desirability of that approach seems evident here where the Eighth Circuit's approach results in stripping the protection of public figure status from the media's discussion of the very entity that offers a solution to the very "problem" that the court defined as the public controversy.

2. There Is No Factual Dispute Concerning The Nature And Extent Of Lundell's Participation In The Public Controversy Identified By The Eighth Circuit Which Precludes This Court's Review

The few basic facts framing the issues presented here are, as noted above, undisputed. Respondent, however, devotes a great deal of attention in its Brief in Opposition to factual matters in an apparent effort to suggest that Lundell was not really much involved in any public controversy at all. In fact, the undisputed record refutes respondent's contention (as it does each of respondent's claims of alleged "misstatements" in the Petition).

- Well before the ABC broadcast, as one of Lundell's own witnesses testified, there were "all kinds of newspaper articles coming out of Berrien, Georgia, that were negative about the [Lundell garbage recycling] system"; this

[2] Legal scholars have challenged the logic of any approach which treats a plaintiff's attempt to influence the outcome of a public controversy "as the sine qua non to public figure status." *See, e.g.*, Rodney A. Smolla, *Law of Defamation* § 2.17, at 2-50 (1996).

newspaper coverage was "very slanted" in suggesting "what a disaster this decision had been to buy this equipment," and, as a result of these "newspaper reports," "the people were blaming the machine." (R. 700)

- The record contains newspaper articles published well before the ABC broadcast that reported, *inter alia*: on discussions with "officials of the Lundell corporation in Iowa" quoting lower construction costs than a competitor and offering "accurate operation figures" to the Berrien County Chairman and indicating that the County's recycling plant "could be paid off in 10 years" (R. 1110); on Berrien County's plan to purchase the machine (R. 1117, 1118); on how the machine was to operate (R. 1135, 1139); on the selection of personnel to oversee installation of the equipment (R. 1123); on the need for a "Lundell representative" to come to Berrien County "to open the plant" (R. 1087), and on the visit of the "Lundell Company's representative" to the plant and the company's related promise to upgrade its equipment (R. 1080).[3] The record also contains a "public notice" referring to the recycling plant as "the Lundell System" and describing alternative ways "to solve the County's solid waste problems." (R. 1090)

- The Eighth Circuit itself noted that ABC began investigating the Berrien County garbage controversy only after its journalist reviewed a story in the *Atlanta Journal-Constitution* about the "Berrien County facility"—*i.e.*,

---

[3] In fact, these and many other newspaper articles relating to the Berrien County garbage controversy were produced by Lundell before trial from Lundell's own file. (R. 290-91) Although respondent makes much of the testimony of Vernon Lundell, Lundell's president, that he personally did not see these clippings until a few months before trial (Br. Opp. at 6), the fact is that the Lundell *company*, the respondent here, maintained a file of newspaper clippings about the Berrien County garbage controversy dating back to 1987 (R. 289-291; 1079-1146). *It* cannot avoid its knowledge of the highly controversial market it chose to enter.

> the equipment Lundell sold to the County (App. 16a; 98 F.3d at 361). The *Atlanta Journal-Constitution* article featured a crude graphic of the Lundell "recycling machine," specifically described the public financing of the machine, reported that the County's garbage recycling plant had lost "money from the day it open[ed]," and concluded that Berrien County taxpayers were "stuck with a debt they didn't approve for a project that doesn't work." (R. 952)[4]

The reality is that Lundell was central, indeed billed itself as the "solution to," the public controversy recognized by the Eighth Circuit as "the garbage disposal problem in Berrien County" (App. 20a; 98 F.3d at 363). This central and voluntary involvement in a matter of public controversy should render Lundell a public figure and militates in favor of review of a legal approach which led to a contrary result.

3. Review Of The Rules For Public Figure Determination Is An Appropriate Function For This Court Under The Constitution

Respondent seems to suggest that appellate review of public figure determinations would be inappropriate because it would constitute a "case by case examination of trial court verdicts" (Br. Opp. at 18-19), and relies for the asserted impropriety of such review on a dissenting statement by Justice Harlan in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting) (Br. Opp. at 18-19). Apparently, Lundell would have this Court conclude that further

---

[4] Although Lundell carefully asserts that the allegation that it employed the Berrien County Chairman as a sales representative for the Lundell garbage recycling machines did not "appear[ ] in any of the *local* media articles" (Br. Opp. at 8 (emphasis added)), the *Atlanta Journal-Constitution* reported that the County Chairman, a major proponent of the garbage recycling project, "later be[came] a sales representative for the company that makes the garbage machine" (R. 952). As the record reflects, this article was published prior to the ABC report.

development of the *Gertz* line of cases, necessarily dependent on review of public figure determinations in specific factual contexts, is somehow barred.

While *Gertz* indeed raised concerns about the standardless nature of the public figure inquiry under *Rosenbloom*, this Court never looked to Justice Harlan's dissent as precluding appellate review of particular public figure determinations. In fact, the Court later made clear in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984), that "[its] role in marking out the limits of the standards through the process of case-by-case adjudication is of special importance" when the standard governing the decision of a particular case is provided by the Constitution. Nothing in *Gertz* or in the practice of this Court bars the Court from granting a petition to resolve recurring, vital questions which have created so significant a split among the circuits.[5]

---

[5] In its final point in opposition (Br. Opp. at 19-20), respondent hypothesizes that the Petition could be mooted by respondent's motion to enforce a surety's liability on the appeal bond posted below by ABC. (Br. Opp. at 20) Even in the unlikely event that respondent's effort to collect on the bond because of a flaw in its wording were to succeed and Lundell's judgment against ABC were then satisfied out of the bond proceeds, any money judgment paid to Lundell could be recovered if this Court granted review and reversed the judgment below. *See, e.g.*, *Graddick* v. *Newman*, 453 U.S. 928, 945 n.* (1981) (Opinion of Justice Rehnquist) ("Since property transferred or money paid involuntarily pursuant to a judgment can be recovered, execution of the lower court's judgment pending appeal normally does not render the case moot."). *See also* 13A Charles A. Wright et al., *Federal Practice & Procedure* § 3533.2, at 247 (West 1984); 13A *id.*, at 156 (1996 Supp.) ("The general rule is now well settled: the case is not moot unless the parties intended to settle or unless it is not possible to take any effective action to undo results of compliance [with the judgment].")

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 26, 1997

Respectfully submitted,

Floyd Abrams
Counsel of Record
80 Pine Street
New York, New York 10005
(212) 701-3000

Of Counsel:

Dean Ringel
Barbara Swann
CAHILL GORDON & REINDEL
(a partnership including
a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

Alan N. Braverman
Senior Vice President
and General Counsel
John W. Zucker
Senior General Attorney
ABC, Inc.
77 West 66th Street
New York, New York 10023

Attorneys for Petitioner
American Broadcasting Companies, Inc.